Filed 7/20/12 P. v. LaPierriere CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JEANETTE ANNE LaPERRIERE, Defendant and Appellant.	H036572 (Monterey County Super. Ct. No. SS091799)

I. STATEMENT OF THE CASE

After the court denied her motion to suppress evidence, defendant Jeannette Anne LaPerriere pleaded no contest to transportation of methamphetamine. (Pen. Code, § 1538.5; Health & Saf. Code, § 11379.) The trial court suspended imposition of sentence and placed her on probation with various conditions. On appeal she claims the court erred in denying her suppression motion. She also claims that a condition of probation prohibiting the use of drugs and alcohol is unconstitutional because it lacks a knowledge requirement.

We uphold the denial of the suppression motion, modify the probation condition to include a knowledge requirement, and affirm the probation order as modified.

II. BACKGROUND[1]

On July 3, 2009, around 4:00 p.m., California Highway Patrol (CHP) Officer Johnathan Bigelow observed defendant and Cristobal Ferrerra drive into the parking lot of the CHP office in Monterey, get out, and came inside. They approached him and asked about getting a vehicle released. Officer Bigelow immediately smelled the odor of marijuana on them and looked at his partner Officer K. Dillon. She apparently also smelled the odor and asked them if they had been smoking marijuana. They said no. While Officer Dillon detained them, Officer Bigelow went out and searched their car. On the floor of the passenger side, he found defendant's purse, and inside it he found a baggie that contained yellowish clear crystals that he tentatively identified as methamphetamine. He also found numerous lighters and paraphernalia consistent with marijuana use. Another officer tested the crystals which proved positive for methamphetamine. Defendant was then arrested.

III. DENIAL OF THE MOTION TO SUPPRESS

The trial court denied the motion to suppress based on a finding that the smell of marijuana emanating from defendant and Ferrerra provided probable cause to arrest defendant, who had been driving the car, for transporting marijuana.

A. Standard of Review

In reviewing the ruling on a motion to suppress, the appellate court defers to the trial court's factual findings, express or implied, when supported by substantial evidence. (*People v. Hoyos* (2007) 41 Cal.4th 872, overruled on other grounds in *People v. McKinnon* (2011) 52 Cal.4th 610, 637-643.) However, in determining whether, on the facts found, there was probable cause to justify the search and thus whether the search

[1] At the motion to suppress, the parties stipulated that the court could base its ruling on the information in the police report. Our summary is based on that report.

was reasonable, we exercise our independent judgment. (*Ibid*.; *People v. Ramos* (2004) 34 Cal.4th 494, 505; *Ornelas v. United States* (1996) 517 U.S. 690, 699.)

B. Applicable Principles

The Fourth Amendment to the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." (U.S. Const., 4th Amend.) "A search conducted without a warrant is unreasonable per se under the Fourth Amendment unless it falls within one of the 'specifically established and well-delineated exceptions.' " (*People v. Woods* (1999) 21 Cal.4th 668, 674, quoting *Katz v. United States* (1967) 389 U.S. 347, 357; *People v. Thompson* (2006) 38 Cal.4th 811, 817-818; *Brigham City v. Stuart* (2006) 547 U.S. 398, 403; *Kyllo v. United States* (2001) 533 U.S. 27, 31.)

Under the automobile exception to the warrant requirement, police may search a vehicle without a warrant and without exigent circumstances if there is probable cause to believe it contains contraband or evidence of a crime. (*Maryland v. Dyson* (1999) 527 U.S. 465, 466-467; *California v. Acevedo* (1991) 500 U.S. 565, 580; *United States v. Ross* (1982) 456 U.S. 798, 804-809.) It is not necessary that the vehicle be occupied or in use at the time; there need only be probable cause to justify the search. (E.g., *Florida v. White* (1999) 526 U.S. 559, 566; *People v. Carrillo* (1995) 37 Cal.App.4th 1662, 1666-1669; *People v. Arango* (1993) 12 Cal.App.4th 450, 454-455.)

"Probable cause to search exists when, based upon the totality of the circumstances . . . , 'there is a fair probability that contraband or evidence of a crime will be found in a particular place.' [Citations.]" (*People v. Farley* (2009) 46 Cal.4th 1053, 1098, quoting *Illinois v. Gates* (1983) 462 U.S. 213, 238.) On the other hand, an officer's hunch or good faith belief is not enough. (*People v. Martin* (1973) 9 Cal.3d 687, 692.) Rather, the circumstances known to the officer must be such as would persuade a person

of reasonable caution that the area to be searched contains contraband or evidence of a crime. (*People v. Thompson, supra,* 38 Cal.4th at p. 818.)

C. Discussion

Odors may constitute probable cause if the magistrate "finds the affiant qualified to know the odor, and it is one sufficiently distinctive to identify a forbidden substance." (*Johnson v. United States* (1948) 333 U.S. 10, 13; see also *People v. Cook* (1975) 13 Cal.3d 663, 668, disapproved on other grounds in People v. Doolin (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Gale* (1973) 9 Cal.3d 788, 794; *United States v. DeLeon* (9th Cir. 1992) 979 F.2d 761, 765; *United States v. Pond* (2d Cir. 1975) 523 F.2d 210, 212.) "The obvious truism that the odor of burning marijuana furnishes probable cause to believe that the substance itself is present has been given frequent expression by our appellate courts." (*People v. Lovejoy* (1970) 12 Cal.App.3d 883, 887; see *Mann v. Superior Court* (1970) 3 Cal.3d 1, 7; *People v. Strasburg* (2007) 148 Cal.App.4th 1052, 1059; *People v. Dey* (2000) 84 Cal.App.4th 1318, 1320-1322; *People v. Fitzpatrick* (1970) 3 Cal.App.3d 824, 826-827; *Vaillancourt v. Superior Court* (1969) 273 Cal.App.2d 791, 797.)

In *People v. Fitzpatrick, supra,* 3 Cal.App.3d 824, a police officer stopped an automobile with one headlight out. When the driver rolled down the window, the officer smelled the odor of burned marijuana, most distinctively on the person of the driver when he stepped out of the car. (*Id.* at p. 825.) The officer searched the driver, reaching into a pocket of his jacket and finding a plastic bag of marijuana. He arrested the defendant and found another bag of marijuana in another pocket. (*Ibid.*) The court explained that upon smelling the odor of marijuana, the officer reasonably could infer that "one who has recently smoked a marijuana cigarette has others in his possession." (*Id.* at pp. 826-827) Thus, the circumstances provided the officer with probable cause to search and arrest the

defendant.[2] (See *People v. Torres* (1981) 121 Cal.App.3d Supp. 9 [probable cause to search and arrest based on odor of PCP emanating from the defendant].)

In this case, Officer Bigelow saw defendant and Ferrerra drive, park, get out, and come into the office. He and Officer Dillon immediately smelled the odor of burnt marijuana, such that they asked the two people whether they had been smoking. Under the circumstances, the officers reasonably could infer that they had recently been smoking marijuana and therefore that they may possess more either with them or in the car that they had just exited.[3] Accordingly, we conclude that the officers had probable cause to search the vehicle under the automobile exception to the warrant requirement.[4]

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[2] Although the search preceded the arrest, it is settled that where an officer has probable cause, a search incident to arrest need not be performed simultaneously with full custodial arrest. The search may precede the actual arrest. (*Rawlings v. Kentucky* (1980) 448 U.S. 98, 111; *People v. Avila* (1997) 58 Cal.App.4th 1069, 1075; see also *People v. Adams* (1985) 175 Cal.App.3d 855, 861; *People v. Fay* (1986) 184 Cal.App.3d 882, 891.)

[3] The record does not reveal that Officers Bigelow and Dillon were qualified to identify the odor of burnt marijuana because the parties submitted the motion to suppress on Officer Bigelow's written report in lieu of live testimony. Under the circumstances, defendant implicitly conceded the officers' qualifications to recognize the odor of burnt marijuana. Moreover, in finding that the officers' smelled marijuana, the court implicitly found that they were qualified to recognize the odor.

[4] In finding that Officer Bigelow had probable cause to arrest defendant for transporting marijuana, the court arguably justified the search as incident to defendant's arrest. However, under that theory, police may search a vehicle "incident to a recent occupant's arrest *only* when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." (*Arizona v. Gant* (2009) 556 U.S. 332, 343, fn. omitted.) Conversely, "[i]f there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply." (*Id.* at p. 339.) Here, defendant and Ferrerra were in the office and thus not within reach of anything that might have been inside the car. Thus the search cannot be justified as incident to the arrest.

Nevertheless, we may affirm the trial court's denial of the motion to suppress if it is "correct under any legal theory. [Citation.]" (*People v. Hua* (2008) 158 Cal.App.4th

Defendant claims this case is distinguishable from the marijuana-odor cases cited above. She notes that in every one of those cases, there were suspicious circumstances or observations by officers in addition to the odor that supported a finding of probable cause. Here, there was only the odor of marijuana emanating from her and Ferrerra. They did not admit they had been smoking marijuana; they did not appear to be under the influence of marijuana; the officers did not see or smell marijuana smoke emanating from the car itself; nor did they observe any paraphernalia. Defendant argues that at most, the odor emanating from them implied that at some time in the past, they had been present where marijuana was being smoked. She claims that under the circumstances, it was pure speculation to infer that there might have been marijuana in the car.

In our view, the circumstances are essentially the same as *People v. Fitzpatrick, supra,* 3 Cal.App.3d 824 except that instead of smelling the odor of marijuana emanating from defendant and Ferrerra while they were inside the car during a routine traffic stop, Officers Bigelow and Dillon smelled the odor after watching them exit the car and enter the office. This factual distinction does not make a material difference.

Given our discussion, we conclude that the trial court properly denied defendant's motion to suppress.

IV. PROBATION CONDITION

At sentencing, the court suspended imposition of sentence and placed defendant on probation with numerous conditions, including that she "[n]ot use or possess alcohol/narcotics, intoxicants, drugs, or other controlled substances without the prescription of a physician; not traffic in, or associate with people you know, or have reason to suspect, use or traffic in narcotics or controlled substances."

1027, 1033.) Here, the search was otherwise justified under the automobile exception in that Officer Bigelow had probable cause to believe there was marijuana in the car.

Defendant claims that the condition is unconstitutional in that it does not require that she actually know that she may be using or possessing alcohol or drugs.

"[P]robation is a privilege and not a right, and . . . adult probationers, in preference to incarceration, validly may consent to limitations upon their constitutional rights . . . . [Citations.]" (*People v. Olguin* (2008) 45 Cal.4th 375, 384.) However, "[a] probation condition 'must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,' if it is to withstand a challenge on the ground of vagueness. [Citation.]" (*In re Sheena K.* (2007) 40 Cal.4th 875, 890 (*Sheena K.*) Generally, to pass constitutional muster, conditions that prohibit possession of specific items or association with certain persons must require that the probationer knowingly possess or associate. (E.g., *People v. Gabriel* (2010) 189 Cal.App.4th 1070, 1073; *People v. Freitas* (2009) 179 Cal.App.4th 747, 752; *People v. Garcia* (1993) 19 Cal.App.4th 97, 102.)

The Attorney General implicitly concedes that the condition does not expressly require knowledge but urges us to adopt the approach taken by the court in *People v. Patel* (2011) 196 Cal.App.4th 956. In that case, the Third District considered whether a probation condition ordering that the defendant not drink alcohol, possess it, or be in a place where it was the chief item of sale was invalid because it lacked a knowledge requirement. (*Id*. at p. 959.) The court expressed its frustration with the "dismaying regularity" with which "we still must revisit the issue in orders of probation" that do not include a qualification that the defendant must commit the proscribed conduct knowingly. (*Id*. at p. 960.) Noting that "there is now a substantial uncontradicted body of case law establishing, as a matter of law, that a probationer cannot be punished for presence, possession, association, or other actions absent proof of scienter" (*ibid*.), the *Patel* court announced that it would "no longer entertain this issue on appeal" (*ibid*.) and, moving forward, it would "construe every probation condition proscribing a probationer's

presence, possession, association, or similar action to require the action be undertaken knowingly" (*ibid*.), without modifying a probation order that "fails to expressly include such a scienter requirement." (*Id*. at p. 961).

In *People v. Moses* (2011) 199 Cal.App.4th 374, 381, the Fourth District declined to adopt the *Patel* approach, choosing instead to modify probation conditions to include a knowledge requirement. We too decline to follow the Third District's approach in *Patel*. Our Supreme Court faced the issue of the lack of a knowledge requirement in a probation condition and the remedy it mandated was unequivocal: "[W]e agree with the Court of Appeal that modification to impose an explicit knowledge requirement is necessary to render the condition constitutional." (*Sheena K., supra*, 40 Cal.4th at p. 892, italics added.) Until our Supreme Court rules differently, we will follow its lead on this point. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Under the circumstances, we modify the probation condition to prohibit defendant from knowingly using or possessing alcohol or narcotics, intoxicant, drugs, or other controlled substances without the prescription of a physician.

V. DISPOSITION

The probation condition is modified to read as follows: "Not knowingly use or possess alcohol/narcotics, intoxicants, drugs, or other controlled substances without the prescription of a physician; not traffic in, or associate with people you know, or have reason to suspect, use or traffic in narcotics or controlled substances."

As modified, the probation order is affirmed.

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

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ELIA, J.